VINCE CHHABRIA (State Bar No. 208557)
COVINGTON & BURLING
One Front Street
San Francisco, California 94111
Telephone: (415) 591-6000
Fax: (415) 591-6091

E. EDWARD BRUCE
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Fax: (202) 662-6291

Attorneys for Plaintiffs

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

E-filing

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ADR

BANK OF AMERICA, N.A.;
BANK OF AMERICA, N.A. (USA);
BANC OF AMERICA INVESTMENT SERVICES, INC.;
BANC OF AMERICA INSURANCE SERVICES, INC.;
WELLS FARGO BANK, N.A.;
WELLS FARGO BANK NEVADA, N.A.;
WELLS FARGO INSURANCE, INC.;
WELLS FARGO HOME MORTGAGE, INC.,

Plaintiffs,

versus

ALAMEDA COUNTY, CALIFORNIA;
SCOTT HAGGERTY, President, Board of Supervisors;
GAIL STEELE, Supervisor;
ALICE LAI-BITKER, Supervisor;
NATE MILEY, Supervisor;
KEITH CARSON, Supervisor;
CRYSTAL HISHIDA, Clerk, Board of Supervisors;
RICHARD E. WINNIE, County Counsel,

Defendants.

C 03 2119 EDL

Civil Action No._______________

COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

1. This complaint seeks declaratory and injunctive relief to protect the federal rights of Bank of America, N.A., Bank of America, N.A. (USA), Banc of America Investment Services, Inc. ("BAI"), Banc of America Insurance Services, Inc. ("BAISI"), Wells Fargo Bank, N.A., Wells Fargo Bank Nevada, N.A., Wells Fargo Insurance, Inc. ("WFII"), and Wells Fargo Home Mortgage, Inc. ("WFHMI") (collectively "Plaintiffs"),[1] under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681t(b)(2), the National Bank Act ("NBA"), 12 U.S.C. § 24(Seventh), and the Gramm-Leach-Bliley Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338 (codified at 15 U.S.C. § 6701(d)). In this action, Plaintiffs seek injunctive and declaratory relief that will allow them to use information, organize, and operate notwithstanding the Alameda County's recently enacted Ordinance Number 2003-28 ("Alameda County Ordinance" or the "Ordinance"; Exhibit A hereto), which becomes effective September 1, 2003.

2. The Ordinance constrains Plaintiffs from sharing information about their customers among affiliates and with third parties, which assist Plaintiffs in offering their services, contrary to the rights conferred on Plaintiffs by the FCRA, NBA, and GLBA. Moreover, the database and processing systems that Plaintiff Banks now use to manage the accounts of and provide ATM services for their depositors and loan customers are also used by the Banks' affiliates for similar purposes, as well as for marketing affiliates' products and services to the Banks' depositors and other customers. It would be prohibitively expensive for the Banks to redesign those systems to allow them to be used for account management of Alameda customers, but not by the Banks' affiliates. Accordingly, to comply with the Alameda Ordinance, the Banks would have to establish separate database and processing systems for Alameda customers that do not permit affiliate sharing. While less expensive than redesigning their current systems, these segregated systems would cost millions of dollars. All of Plaintiffs'

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[1] Bank of America, N.A. and Wells Fargo Bank, N.A. are collectively hereinafter referred to as "Plaintiff Banks" or "the Banks"; Bank of America, N.A. (USA) and Wells Fargo Bank Nevada, N.A. are collectively hereinafter referred to as "Credit Card Banks"; BAISI and WFII are collectively hereinafter referred to as "the Insurance Affiliates."

use of customer information is for the purpose of serving customers or allowing affiliates, and in Wells Fargo's case, third-party joint marketing to advertise their services to the Banks' customers.

Jurisdiction and Venue

3. This action is brought under the Supremacy Clause of the United States Constitution, the FCRA, NBA, GLBA, and 42 U.S.C. § 1983. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States. In addition, jurisdiction is proper under 28 U.S.C. § 1343(a)(3), because Defendants, under color of state law, seek to deprive Plaintiffs of their federal constitutional rights. This Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 & 2202.

4. Venue in this district is proper under 28 U.S.C. § 1391(b)(1) & (2) because Defendants reside in this district and all of the events and omissions giving rise to this case occurred in this district.

Intradistrict Assignment

5. Pursuant to Civil Local Rule 3-2(c) and (d), this matter should be assigned to the San Francisco or Oakland Division of this Court because all of the events or omissions giving rise to the claim occurred in Alameda County.

Related Cases

6. This case is related to *Bank of America, N.A. v. City of Daly City, California*, Civ. No. C 02-4343 CW, and *Bank of America, N.A. v. Contra Costa County, California*, Civ. No. C 02-4943 CW. Like those cases, this case involves a municipal ordinance restricting financial institutions' sharing of customer information with affiliates and nonaffiliated third parties. The local laws in those cases and this one are challenged on the same grounds, *i.e.*, that they are preempted by FCRA, GLBA and NBA. Assignment of these actions to different judges may risk inconsistent results and a waste of judicial resources.

The Parties

7. Bank of America, N.A. ("Bank of America") is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq*. Bank of America operates numerous branches in California, as well as numerous branches in 21 other states and the District of Columbia. It maintains its main office in Charlotte, North Carolina, while its principal California office is in San Francisco. Bank of America has branches in the unincorporated area of Alameda County, and at least some of its customers reside in the unincorporated portions of the County.

8. Bank of America, N.A. (USA), is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq*. Bank of America, N.A. (USA) markets its credit card products to customers and potential customers of Bank of America including those in the unincorporated area of Alameda County, and uses Bank of America's customer information to do so. Bank of America, N.A. (USA) maintains its main office in Phoenix, Arizona. It has no offices in the unincorporated area of Alameda County.

9. BAI is an operating subsidiary of Bank of America pursuant to regulations of the Office of the Comptroller of the Currency ("OCC") issued under the National Bank Act. BAI has registered offices in the unincorporated area of Alameda County. BAI solicits, sells, and markets securities and investment products to the existing customer base of the Bank of America franchise, including customers of Bank of America, such as those in the unincorporated area of Alameda County, and uses Bank of America's customer information to do so.

10. BAISI is a financial subsidiary of Bank of America pursuant to OCC regulations issued under the National Bank Act. BAISI solicits, sells, and markets insurance products to the existing customer base of the Bank of America franchise, including customers of Bank of America, such as those in the unincorporated area of Alameda County, and uses Bank of America's customer information to do so. It has no offices in the unincorporated area of Alameda County.

11. Wells Fargo Bank, N.A. ("Wells Fargo Bank") is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq*. Wells Fargo Bank operates numerous branches in California. Its affiliated national banks have numerous branches in more than 20 additional states. It maintains its main office and principal place of business in San Francisco. Wells Fargo Bank operates at least 1 branch in unincorporated Alameda County, and at least some of its customers reside in the unincorporated portions of the County.

12. Wells Fargo Bank Nevada, N.A., is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq*. Wells Fargo Bank Nevada markets its credit card products to Wells Fargo Bank customers, and potential customers, in the unincorporated area of Alameda County and uses Wells Fargo Bank's customer information to do so. Wells Fargo Bank Nevada also sells, solicits and crossmarkets insurance and certain other products and services through joint agreements with third parties as authorized by GLBA, 15 U.S.C. § 6802(b)(2). In doing so, it uses Wells Fargo Bank's customer information. Wells Fargo Bank Nevada maintains its main office in Nevada. It has no offices in the unincorporated area of Alameda County.

13. WFII is organized as a subsidiary of Wells Fargo & Company, the ultimate holding company of Wells Fargo Bank and Wells Fargo Bank Nevada. WFII solicits, sells, and markets insurance products to the existing customer base of the Wells Fargo franchise, including customers of Wells Fargo Bank in the unincorporated area of Alameda County, and uses Wells Fargo Bank's customer information to do so. WFII sells, solicits, and crossmarkets insurance through joint agreements with third parties as authorized by GLBA, 15 U.S.C. § 6802(b)(2). In doing so, it uses Wells Fargo Bank's customer information. It has no offices in the unincorporated area of Alameda County.

14. WFHMI is organized as an operating subsidiary of Wells Fargo Bank pursuant to OCC regulations issued under the National Bank Act. WFHMI solicits, sells, and markets mortgage products to the existing customer base of the Wells Fargo franchise, including customers of Wells Fargo Bank, such as those in Alameda County, and uses Wells Fargo Bank's

customer information to do so. In doing so, it uses Wells Fargo Bank's customer information. To the best of its knowledge, WFHMI has no offices in the unincorporated area of Alameda County.

15. Defendant Alameda County is an unincorporated organization located in the State of California. For purposes of the Ordinance at issue in this case, it exercises local government power under state law with respect to those portions of Alameda County that are unincorporated.

16. Defendant Scott Haggerty is President of the Board of Supervisors of Defendant Alameda County. As such, he is a voting member of the Board of Supervisors.

17. Defendants Gail Steele, Alice Lai-Bitker, Nate Miley, and Keith Carson are the remaining voting members of the Board of Supervisors of Defendant Alameda County.

18. Defendant Crystal Hishida is the Clerk of the Board of Supervisors of Defendant Alameda County. As such, she is the City official charged with taking the ministerial acts necessary for the Alameda County Ordinance to become effective.

19. Defendant Richard E. Winnie is the County Counsel of Defendant Alameda County. As such, he is the county official charged with enforcing the municipal code of Alameda County, including the enforcement provisions of the Alameda County Ordinance.

The Relevant Federal Statutory and Constitutional Provisions:

The Fair Credit Reporting Act

20. The FCRA, 15 U.S.C. § 1681 *et seq.*, defines the rights and obligations of banks, financial institutions and other corporations that receive, use, collect or exchange information regarding the creditworthiness of consumers and certain other consumer characteristics. Among other things, the FCRA expressly authorizes such institutions to exchange information with their affiliates regarding their experiences with their customers. For example, the FCRA allows financial institutions and other corporations to share information with affiliates, which they have derived from their dealing with their customers – so-called "experience information" – including information regarding those customers' "credit worthiness, credit standing, credit capacity, character, general reputation, personal

characteristics, or mode of living." 15 U.S.C. § 1681m(b)(1). Moreover, the FCRA imposes no restrictions on the sharing of other information about customers – such as their names and addresses – that does not relate to creditworthiness or the above-quoted consumer characteristics.

21. The FCRA also allows such institutions to share information derived from other sources bearing on creditworthiness or relating to the consumer characteristics listed above – so called "non-experience information," for example, information derived from credit reports obtained from credit agencies – with their affiliates, provided that the institution gives the consumer notice and the opportunity to "opt out" of such non-experience information sharing before it occurs. The FCRA "opt out" allows a consumer to inform the institution that such "non-experience" information should not be shared by the institution with its affiliated corporate entities. 15 U.S.C. § 1681a(d).

22. The FCRA provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ." 15 U.S.C. § 1681t(b)(2). This provision expressly preempts state law that purports to regulate sharing between affiliates of any type of information relating to their customers. Section 1681t of the FCRA further provides that this preemption provision "do[es] not apply to any provision of State law (including any provision of a State constitution) that – (A) is enacted after January 1, 2004; (B) states explicitly that the provision is intended to supplement this subchapter [*i.e.*, the FCRA]; and (C) gives greater protection to consumers than is provided under this subchapter [*i.e.*, the FCRA]." 15 U.S.C. § 1681t(d)(2).

The National Bank Act

23. National banks are federally-chartered institutions created under, governed, and exercising their authorized powers as granted by the National Bank Act, 12 U.S.C. § 21 *et seq.*

24. Under the National Bank Act, the OCC has exclusive regulatory, supervisory, and enforcement authority with respect to national banks' provision of banking services. *See* 12 U.S.C. §§ 24(Seventh), 484(a).

25. Congress has authorized national banks "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). These powers under 12 U.S.C. § 24(Seventh) include the authority to advertise and market the national bank's own products and services, as well as those of its affiliates, and to organize in the most efficient and effective form, including undertaking activities through subsidiaries and/or affiliates. *See*, *e.g.*, 12 C.F.R. §§ 5.34, 5.39. National banks and their subsidiaries may also engage in authorized activities through joint marketing arrangements with nonaffiliated third parties.

26. The OCC has promulgated a regulation, 12 C.F.R. § 7.4006, making clear that national banks' operating subsidiaries enjoy the same preemptive protection of the National Bank Act as do their parent national banks.

Gramm-Leach-Bliley Act Privacy Provisions

27. Subtitle A of title V of GLBA provides for financial institutions' sharing of nonpublic personal information with affiliates and nonaffiliated third parties. *See* 15 U.S.C. § 6801 *et seq*. GLBA imposes no restrictions of information sharing among affiliates. However, GLBA provides that financial institutions may not disclose nonpublic personal information to a nonaffiliated third party unless it provides the customer with notice and an opportunity to "opt out" of such third-party information sharing, 15 U.S.C. § 6802(a) & (b)(1), except sharing with such third parties pursuant to an agreement to market jointly a product or service is not subject to customer opt out. *See* 15 U.S.C. § 6802(b)(2).

28. Subtitle A of title V of GLBA provides that the GLBA "shall [not] be construed to modify, limit, or supersede the operation of the [FCRA]," 15 U.S.C. § 6806, and Subtitle A of title V of GLBA does not purport to affect the operation of the National Bank Act. To the contrary, the savings clause of title V that allows states to provide greater protection to

consumers than title V of GLBA is limited to "this subchapter," *i.e.*, title V. 15 U.S.C. § 6807(a).

29. The annual notice to the consumer under GLBA must include the "financial institution's policies and practices with respect to . . . (1) disclosing nonpublic personal information to affiliates and nonaffiliated third parties . . .; (2) disclosing nonpublic personal information of persons who have ceased to be customers of the financial institution; and (3) protecting the nonpublic personal information of consumers." 15 U.S.C. § 6803(a). In addition, the notice must contain information "with respect to . . . the categories of persons to whom the information is or may be disclosed," "the categories of nonpublic personal information collected by the financial institution," and "the disclosures required" for the customer to "opt out" of "non-experience" information sharing among affiliates contained in the FCRA, as described more fully above in paragraph 21. *Id.*

Gramm-Leach-Bliley Act Insurance Preemption Provision

30. Section 104(d)(2)(A) of title I of GLBA provides that "[i]n accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity." 15 U.S.C. § 6701(d)(2)(A). Bank of America and Wells Fargo Bank are "depository institutions" within the meaning of 15 U.S.C. § 6701(d)(2)(A), and BAISI and WFII are "affiliates" of depository institutions within the meaning of 15 U.S.C. § 6701(d)(2)(A).

Supremacy Clause of the United States Constitution

31. Article VI of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Alameda County Ordinance

32. The Ordinance was adopted after a second reading by the City Council on November 12, 2002. It will become effective on September 1, 2003. Alameda County Ordinance § 2.

33. The Ordinance applies to "financial institutions" "located in the unincorporated areas of Alameda County." Ordinance §§ 3.70.020(c), 3.70.030(a). Plaintiff Banks with branches in the unincorporated areas of Alameda County are subject to the Ordinance, as are any of their affiliates with offices there.

34. The Ordinance provides that "[a] financial institution located in the unincorporated area of Alameda County shall not disclose confidential consumer information to an affiliate unless the financial institution clearly and conspicuously discloses annually, commencing upon the effective date of this Chapter, to the consumer in writing that the information may be disclosed to an affiliate of the financial institution. Pursuant to this [annual] disclosure[,] the consumer shall be provided an opportunity, before disclosure of information, of 45 days from the date of postmark of the notice to direct that the confidential consumer information not be disclosed to an affiliate [*i.e.*, a consumer 'opt out']." *Id.* § 3.70.040(f). During that 45-day period, there shall be no disclosure of information about the Alameda customer. On its face, the Ordinance requires that the Banks must cease sharing customer information with their affiliates for 45 days each year pending the opt-out opportunity. The imposition of such a restriction on sharing information with affiliates is directly contrary to, and expressly preempted by, the FCRA which provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ." 15 U.S.C. § 1681t(b)(2).

35. The Ordinance also provides that "[a] financial institution located in the unincorporated area of Alameda County shall not disclose to, or share a consumer's confidential consumer information with, any nonaffiliated third party unless the financial institution has provided written notice to the consumer to whom the confidential consumer information relates

and unless the financial institution has obtained a consent acknowledgment signed by the consumer that authorizes the financial institution to disclose or share the confidential consumer information [*i.e.*, a consumer 'opt in']." Alameda County Ordinance § 3.70.030(a); *accord id.* at § 3.70.040(e).

36. "'Confidential consumer information' means personally identifiable financial information (1) that a consumer provides to a financial institution to obtain a product or service from the financial institution, (2) about a consumer resulting from any transaction involving a product or service between the financial institution and a consumer, or (3) that the financial institution otherwise obtains about a consumer in connection with providing a product or service to that consumer." Alameda County Ordinance § 3.70.020(a). "[P]ersonally identifiable financial information" includes "the fact that a consumer is a customer of a financial institution or has obtained a financial product or service from a financial institution." *Id.*

37. "A financial institution located in the unincorporated area of Alameda County that proposes to share a consumer's confidential consumer information shall provide written or electronic notices and consent acknowledgements . . . as separate documents . . . . [that] shall include at least the following: (a) The specific types of information that would be disclosed or shared, (b) The general circumstances under which the information would be disclosed or shared, (c) The specific types of persons or businesses that would receive the information, and (d) The specific proposed types of uses for the information." Alameda County Ordinance § 3.70.040(b) & (c). The notice required by the Ordinance is more specific than the notice required by the FCRA and GLBA.

38. The Ordinance in certain circumstances exempts licensed insurance producers and licensed securities broker-dealers from its notice and consent requirements. Alameda County Ordinance § 3.70.060. Plaintiff Banks are not so licensed and accordingly cannot avail themselves of this exception.

39. The Ordinance exempts the release of "confidential consumer information . . . to provide information to insurance rate advisory organizations" from its notice and consent requirements. Alameda County Ordinance § 3.70.050(b)(4). Plaintiff Insurance

Affiliates are not "insurance rate advisory organizations" and accordingly cannot avail themselves of this exception.

40. A financial institution that discloses confidential consumer information in violation of the Ordinance is subject to an administrative penalty up to $250,000 per violation. Alameda County Ordinance § 3.70.070.

The Effect Of The Ordinance

41. The effect of the Ordinance on financial institutions would be to impair, or entirely prevent, information sharing with both corporate affiliates and nonaffiliated third joint-marketing partners as otherwise authorized by applicable federal law. The Ordinance prevents the Banks from sharing customer information with affiliates for 45 days each year. Thereafter, they may do so, only if a customer does not opt out. By contrast, under the FCRA, information that the institution obtains from its own experience with a consumer regarding that individual's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," 15 U.S.C. § 1681m(b)(1), can be shared without restriction among affiliates, as can other information, such as a customer's name, which does not relate to creditworthiness. 15 U.S.C. § 1681a(d)(2).

42. Plaintiffs carry on their authorized activities in interstate commerce, as part of the nationwide banking, currency and credit system established by the NBA, 12 U.S.C. § 21 *et seq*. At significant costs, the Bank of America Plaintiffs and the Wells Fargo Plaintiffs have each established and maintain for their respective organizations a centralized database and processing system used by the Plaintiff Banks and their subsidiaries and affiliates to carry on their operations in the most efficient way possible. These centralized systems and databases are necessary to manage customer accounts, allow the use of ATMs, and provide all of the functions necessary in modern banking. They were set up consistent with the requirements of the FCRA and are used by the Bank of America and Wells Fargo Plaintiffs, respectively, to provide customer service as well as to market additional products and services to their respective customers. These systems cannot effectively be redesigned for use for only the specific purposes allowed by the Ordinance.

43. Because the Ordinance forbids the Banks from denying products and services to customers who opt out, the Banks would have to establish a separate data processing system to accommodate residents of unincorporated Alameda County who may choose later to opt out. Moreover, the Banks must continue to allow those customers to make deposits, cash checks, use ATMs and otherwise continue to be treated as traditional bank customers of Bank of America or Wells Fargo throughout California and the other states where Bank of America has branches or Wells Fargo has affiliate banks. The Banks have never had to so segregate their data processing systems, but they estimate the cost of doing so would be millions of dollars each. In any event, whether or not any given customer later opts out, the Ordinance requires that the Banks treat these customers as if they have opted out during the 45-day sharing ban.

44. The costs of extracting Alameda County bank deposit customers from the existing shared database and processing systems would be significant. These customers must have all of the information associated with their deposit or loan accounts taken out of the shared system and put into a segregated system for use only by the Bank so as not to be available to that Bank's affiliates. However, the customers who also have credit cards from the Bank's credit card affiliate or insurance from the insurance affiliate would continue to have those accounts handled by the common database and processing system because neither the Credit Card Banks nor the Insurance Affiliates are located within unincorporated Alameda County. Thus, extraction of an Alameda County resident from the common database only for purposes of its bank account management requires complex programming. By the same token, there would be complexities and significant expense in returning an Alameda County customer to the shared database and processing system at the expiration of the 45-day period, if the customer does not opt out of sharing. While none of the Plaintiffs have confronted a regulatory regime like the one established by the Ordinance, both believe that the most cost-effective way of complying with the Ordinance would be to leave all Alameda County customers in a segregated database or processing system and not share any of their banking information with affiliates or third parties. While the Banks, as a matter of policy, honor depositors' decisions to not receive solicitations from affiliates and have developed protocols within their databases and processing systems to

implement this policy, they have no such protocols to prevent the customer information sharing in the manner prescribed by the Ordinance. Accordingly, while nominally an opt-out system, in fact the Alameda Ordinance will require the Banks, to the extent that they can identify Alameda County residents, to remove those customers from their shared database and processing systems.

45. The Alameda Ordinance applies only to consumers residing in unincorporated Alameda County. Accordingly, it would require the Banks to determine exactly where their customers reside – for example in Oakland which is not part of unincorporated Alameda County, or in other locations which are. The Banks cannot easily separate out customers based on zip-codes or the like, because such easily defined markers cross the boundary between incorporated and unincorporated parts of the County.

46. Therefore, if it becomes effective, the Ordinance would force the Banks either to: (1) close their branches in unincorporated Alameda County, and thereby escape the limitations of the Ordinance; or (2) attempt to identify customers governed by the Ordinance and set up a separate database and processing system at great expense for those customers. Either of these alternatives will prevent or significantly interfere with the Banks' own operations and with their federal rights to operate with subsidiaries and affiliates.

47. The Alameda Ordinance will also affect the Credit Card Banks and WFHMI. If the Ordinance becomes effective, the ability of the Credit Card Banks and WFHMI, which are not even located in unincorporated Alameda County, to market and sell their own products and services to customers and potential customers would be curtailed or prevented because they could not continue to use Plaintiff Banks' customer information systems and databases to identify these customers.

48. Similarly, the effect of the Ordinance on the Insurance Affiliates would be significant. Presently, the Insurance Affiliates, which also are not located in unincorporated Alameda County, market and sell almost entirely to the existing customer base of Plaintiff Banks and their affiliates. By preventing the Insurance Affiliates from accessing the data in the shared systems for covered customers, the Insurance Affiliates' sales and marketing operations would be curtailed.

49. The Ordinance would impair BAI's marketing activities, for example by preventing BAI from using its parent Bank's "experience information" with its customers in BAI's cross-marketing campaigns. Moreover, BAI being located in Alameda County would no longer be able to use the shared database and processing system to serve its Alameda customers for the same reason that its affiliated Bank cannot use that system. Accordingly, like the Bank, BAI would have to establish at great cost a segregated system to manage the accounts of those customers. Finally, the Ordinance would interfere with BAI's use of dual-employees, those who are employed both as bankers at Bank of America, while also operating as BAI sales employees.

50. The effect of the Ordinance would also be to prevent or interfere significantly with the ability of Wells Fargo Bank Nevada and WFII to engage in the sale, solicitation, and crossmarketing of insurance and certain other products and services through joint agreements authorized by 15 U.S.C. § 6802(b)(2).

51. The Ordinance's notice requirements would also cause further substantial injury to Plaintiff Banks. The Banks would have to create separate notices to comply with the Ordinance, which would have to be sent to customers as a separate stand-alone document. Alameda County Ordinance § 3.70.040(b). The Banks could not integrate this notice, or their standard annual notices required under federal law, with those of their affiliates as they now do.

52. A case or controversy exists between the parties requiring resolution by this Court.

Claims for Relief

Count I – Declaratory and Injunctive Relief:

FCRA Preemption of the Ordinance

53. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 52 of this Complaint as though fully set forth herein.

54. The FCRA expressly allows financial institutions to share with affiliates, without restriction, information that they obtain from their own transactions with the consumer, including information regarding the consumer's "credit worthiness, credit standing, credit

capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681m(b)(1). The FCRA also expressly allows such institutions to share other information bearing on creditworthiness or relating to the aforementioned consumer characteristics – so called "non-experience information" – with their affiliates. *Id.* § 1681a(d)(2). The FCRA imposes no restrictions on the sharing of information not bearing on creditworthiness or related to the other listed consumer characteristics.

55. The FCRA provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . .," except for a specified Vermont statute in effect on September 30, 1996. 15 U.S.C. § 1681t(b)(2). This prohibition applies to local laws enacted before January 1, 2004. *Id.* § 1681t(d).

56. The Ordinance imposes "requirement[s] and prohibition[s] . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control" by, *inter alia*, providing for the requirement of a separate notice, a 45 day prevention on the sharing of any customer information with affiliates, and the requirement of an "opt out" thereafter before Plaintiff Banks can share information with affiliated entities.

57. The Ordinance accordingly is expressly preempted by 15 U.S.C. § 1681t(b)(2), and is unconstitutional under Article VI of the United States Constitution.

Count II – Declaratory and Injunctive Relief:

National Bank Act Preemption of the Ordinance

58. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 52 of this Complaint as though fully set forth herein.

59. Plaintiff have the authority under the National Bank Act "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). National banks' authorized powers under § 24(Seventh) include the power to advertise and market their authorized services.

60. OCC regulations implementing the National Bank Act provide that "[a] national bank may conduct in an operating subsidiary activities [including marketing activities] that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking." 12 C.F.R. § 5.34(e). Further, the OCC has provided by regulation that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006. The OCC's regulations also permit national banks to own financial subsidiaries that are authorized to provide products and services that national banks are authorized to provide, but also other related products and services that national banks cannot provide. 12 C.F.R. § 5.39.

61. The Ordinance prevents national banks from sharing confidential consumer information with all subsidiaries and affiliates for 45 days each year, and thereafter if a customer "opts out" of such sharing. Alameda County Ordinance § 3.70.040(f). As a practical matter, this on-again/off-again regime would result in a removal of all Alameda County residents from the database and processing systems that the Banks' subsidiaries or affiliates now use to market their own as well as the Banks' products and services. The Ordinance thus prevents or substantially interferes with the Banks' federally authorized power to advertise and market their own products to their own customers through their subsidiaries and affiliates, for example the marketing of Plaintiff Banks' debit cards through the Credit Card Banks, or mortgages through an operating subsidiary. Accordingly, the Ordinance conflicts with national banks' federally authorized powers under 12 U.S.C. § 24(Seventh).

62. The Alameda Ordinance has additional impacts on Wells Fargo. Unlike Bank of America, which operates its branches throughout the United States as part of a single corporate entity, Wells Fargo Banks are separately incorporated national banks for each of the states in which Wells Fargo has branches. In some situations, one Wells Fargo Bank provides a service or product for all of the affiliated Wells Fargo Banks. Thus, Wells Fargo Bank, N.A. provides the home equity loan products and Wells Fargo Bank South Dakota, N.A. provides the student loan products for all Wells Fargo customers. The Ordinance would prevent Wells Fargo

from using its common customer information sharing systems to provide integrated, seamless service to customers throughout the United States. For example, Wells Fargo Nevada could not view the experience information in the Wells Fargo shared system if an Alameda customer applied for a loan at a Nevada branch, or came to the branch to cash a Wells Fargo check. In these circumstances, the Alameda customer would, therefore, be treated like Wells Fargo Bank Nevada as though he or she were not a Wells Fargo customer at all.

63. The Ordinance will also seriously impair Plaintiff Banks' federally authorized authority to engage in deposit taking and lending operations under 12 U.S.C. § 24(Seventh). For example, Bank of America for many years has used a subsidiary, Bank of America Technology and Operations, Inc. ("BATO"), to handle all data processing and records storage for its accountholders. Wells Fargo similarly uses a single customer information system (maintained by Wells Fargo Services Co. ("WFSC")) that contains all of its experience information about its customers which is available to affiliated Wells Fargo Banks and other consumer financial affiliates. Because this experience information about particular customers cannot be separated by the Bank so that other affiliates receive it only for specific account maintenance purposes, the Banks would be confronted with millions of dollars of costs to set up segregated systems for all of their Alameda customer contact and account functioning. Wells Fargo Bank faces greater problems regarding its utilization of WFSC since it is also used by all affiliated national banks to provide core banking services to Alameda customers. As such, the Ordinance prevents or significantly interferes with the exercise of national banks' powers under 12 U.S.C. § 24(Seventh).

64. The Ordinance would also prevent or significantly interfere with Plaintiff Banks' exercising their powers under 12 U.S.C. § 24(Seventh) and OCC regulations, 12 C.F.R. §§ 5.34, 5.39 & 7.4006, to offer their customers and potential customers products and services indirectly through their subsidiaries and affiliates. For example, the Ordinance would prevent the Credit Card Banks, as national banks, from using the shared database and processing systems to obtain information needed to market and sell the Credit Card Banks' credit card and the Banks' own debit card that is marketed by the Credit Card Banks. Similarly, WFHMI, an

operating subsidiary of Wells Fargo Bank, could not use the Wells Fargo Bank system to market and sell WFHMI's products to covered Wells Fargo Bank customers, or to offer mortgage rate discounts to these Wells Fargo Bank customers who maintain specified asset balances with the Wells Fargo franchise. In this regard, the Ordinance also conflicts with national banks' powers under 12 C.F.R. §§ 5.34, 5.39 & 7.4006 and other OCC regulations to organize and operate in the corporate and organizational forms that national banks find most convenient and useful.

65. The Ordinance would also impair the ability of Wells Fargo Bank Nevada, as a national bank, to sell, solicit and crossmarket insurance and certain other products and services to the customers of Wells Fargo Bank through "joint agreements" with other financial institutions, as they now do pursuant to 15 U.S.C. § 6802(b)(2). By subjecting such joint agreements to a customer "opt in," the Ordinance would prevent or significantly interfere with the ability of national banks, like Plaintiff Wells Fargo Bank Nevada to advertise and market to customers and potential customers through such agreements.

66. The Ordinance, insofar as it applies to Plaintiffs, as national banks and their operating subsidiaries, is therefore preempted under Article VI of the United States Constitution by the National Bank Act, 12 U.S.C. § 24(Seventh), as it is implemented by the OCC's regulations.

Count III – Declaratory and Injunctive Relief:

GLBA Insurance Provision Preemption of the Ordinance

67. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 52 of this Complaint as though fully set forth herein.

68. Section 104(d)(2)(A) of GLBA provides that "[i]n accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity." 15 U.S.C. § 6701(d)(2)(A).

69. The Banks are depository institutions within the meaning of 15 U.S.C. § 6701(d)(2)(A). They are affiliated with their Insurance Affiliates and regularly share their customer names and addresses with their Insurance Affiliates in order to facilitate the sale, solicitation, and crossmarketing of insurance by their Insurance Affiliates.

70. The Ordinance prevents or significantly interferes with the ability of Plaintiff Banks to share such information and the ability of their Insurance Affiliates to engage in such insurance sales, solicitation, and crossmarketing activities.

71. The Ordinance's opt-in requirement also prevents or significantly interferes with the ability of WFII and Wells Fargo Bank Nevada to sell, solicit, and crossmarket insurance through joint agreements, as authorized by 15 U.S.C. § 6802(b)(2).

72. The Ordinance accordingly is preempted under Article VI of the United States Constitution by 15 U.S.C. § 6701(d)(2)(A).

Count IV – Declaratory and Injunctive Relief:

Preemption of Local Enforcement of the Ordinance

73. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 52 of this Complaint as though fully set forth herein.

74. The Ordinance provides for administrative enforcement by local officials.

75. Under the NBA, 12 U.S.C. § 484, and other provisions of the federal banking laws and OCC regulations, the OCC has exclusive regulatory and enforcement authority over Plaintiff Banks, and other national banks, as well as national banks' subsidiaries like BAI with regard to their sharing of customer information with affiliates and nonaffiliated third parties as well as with regard to the customer information sharing notices of national banks.

76. The enforcement of the Ordinance is preempted under Article VI of the United States Constitution, insofar as the Ordinance applies to national banks such as Plaintiff Banks and their subsidiaries, by 12 U.S.C. § 484 and other provisions of the federal banking laws and applicable OCC implementing regulations, because the Ordinance conflicts with the

OCC's exclusive enforcement authority over national banks with regard to their authorized products and services.

Count V – Attorneys' Fees:

Claim Under 42 U.S.C. § 1983

77. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 52 of this Complaint as though fully set forth herein.

78. Plaintiffs are granted federal rights under the FCRA, NBA, GLBA, and Article VI of the United States Constitution to share their customer information among affiliated corporations and nonaffiliated third parties free of state requirements, restrictions, and prohibitions like those imposed by the Ordinance.

79. By adopting, implementing and enforcing the Ordinance, Defendants are thus depriving Plaintiffs of their federal rights under the FCRA, NBA, GLBA, and Article VI of the United States Constitution.

80. Defendants are "persons" under 42 U.S.C. § 1983 who have acted under color of state law to deprive Plaintiffs of rights secured by the federal Constitution and laws.

81. Plaintiffs have incurred attorneys' fees in pursuance of their claims that are recoverable from Defendants under 42 U.S.C. § 1988.

Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

A. Enter a judgment declaring that the Alameda County Ordinance Number 2003-28 (enacted Nov. 12, 2002) is null and void and unenforceable, insofar as it applies to Plaintiffs, as national banks, or national bank subsidiaries and/or affiliates, because it is preempted under Article VI of the United States Constitution as being (i) expressly preempted by the Fair Credit Reporting Act, and section 104 of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999); and (ii) in conflict with the National Bank Act and implementing OCC regulations;

B. Enter a permanent injunction, Plaintiffs having no adequate remedy at law and suffering irreparable injury as a result of this unconstitutional local Ordinance, ordering

Defendants to suspend the Ordinance, and otherwise enjoining Defendants, as well as any other person acting in the name of Alameda County, or of the People of the State of California, from allowing the Ordinance to become effective, or enforcing or taking any action to enforce the Ordinance;

C. Should Plaintiffs so move, enter a preliminary injunction pending final resolution of this action, Plaintiffs having no adequate remedy at law and suffering irreparable injury as a result of this unconstitutional local Ordinance, ordering Defendants to suspend the Ordinance, and enjoining Defendants, as well as any other person acting in the name of Alameda County, or of the People of the State of California, from enforcing or taking any action to enforce the Ordinance, pending further order of this Court;

D. Award Plaintiffs their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

E. Grant Plaintiffs such other and further relief, including costs, as the Court may deem just and proper.

Respectfully submitted,

VINCE CHHABRIA (State Bar No. 208557)
COVINGTON & BURLING
One Front Street
San Francisco, California 94111
Telephone: (415) 591-6000
Fax: (415) 591-6091

ATTORNEYS FOR PLAINTIFFS

E. EDWARD BRUCE
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Fax: (202) 662-6291

May 5, 2003

Attachment A

Approved as to Form
RICHARD E. WINNIE, County Counsel

By________________

ORDINANCE NO. 2003-28

BOARD OF SUPERVISORS, COUNTY OF ALAMEDA,

STATE OF CALIFORNIA

****

AN ORDINANCE REGULATING THE DISCLOSURE OF CONFIDENTIAL CONSUMER INFORMATION BY FINANCIAL INSTITUTIONS

The Board of Supervisors of the County of Alameda, State of California, ORDAINS, as follows:

SECTION 1: Chapter 3.70, entitled "Disclosure of Confidential Consumer Information by Financial Institutions", and consisting of Sections 3.70.010 to 3.70.090, of Title 3 of the Alameda County Ordinance Code is hereby added as follows:

3.70.010 Purpose and Intent

(a) It is the purpose and intent of the Board of Supervisors that the operation of financial institutions as defined in this ordinance should be regulated so as to provide customers of financial institutions who are Alameda County residents or a business entity with its principal place of business in the unincorporated area of Alameda County notice and meaningful choice about how their confidential consumer information is shared or sold by their financial institutions and to prohibit the disclosure of confidential consumer information without first securing the consumer's consent.

(b) It is the intent of the Board of Supervisors in enacting this ordinance to afford Alameda County residents and businesses greater financial privacy protection than those provided in Public Law 106-102, the federal Gramm-Leach-Bliley Act, and that this ordinance be interpreted to be consistent with that purpose.

3.70.020 Definitions

(a) "Confidential consumer information" means personally identifiable financial information (1) that a consumer provides to a financial institution to obtain a product or service from the financial institution, (2) about a consumer resulting from any transaction involving a product or service between the financial institution and a consumer, or (3) that the financial institution otherwise obtains about a consumer in connection with providing a product or service to that consumer. Any personally identifiable information is financial if it was obtained by a financial institution in connection with providing a financial product or service to a consumer, including the fact that a consumer is a customer of a financial institution or has obtained a financial product or service from a financial institution. Confidential consumer information does not include publicly available information that the financial institution has a reasonable basis to believe is lawfully made available to the general public from (1) federal, state, or local government records, (2) widely distributed media, or (3) disclosures to the general public that are required to be made by federal, state, or local law. Confidential consumer information shall include any list, description, or other grouping of consumers, and publicly available information pertaining to them that is derived using any nonpublic personal information other than publicly available information, but shall not include any list, description, or other grouping of consumers, and publicly available information pertaining to them that is derived without using any confidential consumer information.

(b) Confidential consumer information includes, but is not limited to, all of the following:

(1) Information a consumer provides to a financial institution on an application to obtain a loan, credit card, or other financial product or service.

(2) Account balance information, payment history, overdraft history and credit or debit card purchase information.

(3) The fact that an individual or a business entity is or has been a customer of a financial institution located within the unincorporated area of Alameda County or has obtained a financial product or service from a financial institution.

(4) Any information about a financial institution's consumer if it is disclosed in a manner that indicates that the individual or business entity is or has been the financial institution's consumer.

(5) Any information that a consumer provides to a financial institution or that a financial institution located within the unincorporated area of Alameda County or its agent otherwise obtains in connection with collecting on a loan or servicing a loan.

(6) Any information collected through an Internet cookie or an information collecting device from a Web server.

(7) Information from a consumer report.

(8) A consumer's Social Security number.

(c) "Financial institution" generally means any institution or person physically located in the unincorporated area of Alameda County that is engaging in financial activities as described in Section 1843 (k) of Title 12 of the United States Code and doing business in the unincorporated area of Alameda County. The term "financial institution" does include a commercial bank, trust company, savings association, industrial loan company, credit union, insurance company, securities brokerage or person to the extent, and only to the extent, that the business or person is engaged in the business of lending money or engaging in financial activities as set forth above in the unincorporated area of Alameda County. The term "financial institution" does not include the Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 or any institution chartered by Congress specifically to engage in securitization, secondary market sale, or similar transactions related to a transaction of the consumer, or any person licensed as a dealer under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code that enters into contracts for the installment sale or lease of motor vehicles pursuant to the requirements of Chapter 2b (commencing with Section 2981) or 2d (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of the Civil Code.

(d) "Affiliate" means any person or entity that, directly or indirectly, controls, is controlled by, or is under common control with another person or entity. A franchisor, including any affiliate thereof, shall be deemed an affiliate of the franchisee for purposes of this ordinance.

(e) "Nonaffiliated third party" means any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control, with the financial institution.

(f) "Consumer" means a natural person residing in the unincorporated area of Alameda County, or that person's legal representative, or a business entity with its principal place of business in the unincorporated area of Alameda County who obtains or has obtained, from a financial institution as defined in subsection (c) above, a financial product or service: (1) That is to be used by such natural person primarily for personal, family, or household purposes, or that individual's legal representative; or (2) for a business entity that is used in the course of business by that business entity. For purposes of this ordinance, an individual is does not become a "consumer" of a financial institution solely because he or she is (1) a participant or beneficiary of an employee benefit plan that a financial institution administers or sponsors, or for which the financial institution acts as a trustee, insurer, or fiduciary, (2) covered under a group or blanket insurance policy or group annuity contract issue by the financial institution, or (3) a beneficiary in a workers' compensation plan.

(g) "Control" means the direct or indirect possession of the power to direct or cause the direction of the management and policies of another entity. Control includes any of the following: (1) ownership or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, acting through one or more persons, (2) power in any manner over the election of a majority of the directors, or of individuals exercising similar functions, or (3) the power to exercise a directing influence over the management of policies of a company.

(h) "Necessary to effect, administer, or enforce" means the following:

(1) The disclosure is required, or is a usual, appropriate, or acceptable method to carry out the transaction or the product or service business of which the transaction is a part, and record or service or maintain the consumer's account in the ordinary course of providing the financial service or financial product, or to administer or service benefits or claims relating to the transaction or the product or service business of which it is a part, and includes the following:

(A) Providing the consumer or the consumer's agent or broker with a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product.

(B) The accrual or recognition of incentives or bonuses associated with the transaction that are provided by the financial institution located in the unincorporated area of Alameda County or another party involved in providing the financial service or product.

(2) The disclosure is required or is a lawful method to enforce the rights of the financial institution or of other persons engaged in carrying out the financial transaction or providing the product or service.

(3) The disclosure is required, or is a usual, appropriate, or accepted method for insurance underwriting at the consumer's request, for reinsurance purposes, or for any of the following purposes as they relate to a consumer's insurance:

(A) Account administration.

(B) Reporting, investigating, or preventing fraud or material misrepresentation.

(C) Processing premium payments.

(D) Processing insurance claims.

(E) Administering insurance benefits, including utilization review activities.

(F) For internal research purposes.

(G) As otherwise required or specifically permitted by federal or state law.

(4) The disclosure is required, or is a usual, appropriate or acceptable method, in connection with the following:

(A) The authorization, settlement, billing processing, clearing, transferring, reconciling, or collection of amounts charged, debited, or otherwise paid using debit, credit or other payment card, check or account number, or by other payment means.

(B) The transfer of receivables, accounts, or interest therein.

(C) The audit of debit, credit, or other payment information.

(i) "Financial product or service" means any product or service that a financial holding company could offer by engaging in any activity that is financial in nature or incidental to financial activity under subsection (k) of Section 1843 of Title 12 of the United States Code (the United States Bank Holding Company Act of 1956). Financial service includes a financial institution's evaluation or brokerage of information that the financial institution collects in connection with a request or an application from a consumer for financial product or service.

(j) "Clearly and conspicuously" means displayed in a manner that is readily noticeable, readable, and understandable to consumers. Factors to be considered in determining whether a notice or disclosure is clear and conspicuous include prominence, proximity, absence of distracting elements, and clarity and understanding of the text disclosure.

(k) "Widely distributed media" means publicly available information from a telephone book, a television or radio program, a newspaper or a Web site that is available to the general public on an unrestricted basis.

(l) "Disclose" or "share" means the provision of confidential consumer information to an affiliate or a nonaffiliated third party by a financial institution located within unincorporated Alameda County.

3.70.030 Non-Disclosure of Confidential Consumer Information

(a) A financial institution located in the unincorporated area of Alameda County shall not disclose to, or share a consumer's confidential consumer information with, any nonaffiliated third party unless the financial institution has provided written notice to the consumer to whom the confidential consumer information relates and unless the financial institution has obtained a consent acknowledgment signed by the consumer that authorizes the financial institution to disclose or share the confidential consumer information. A financial institution shall not deny a consumer a financial product or a financial service because the consumer has not provided the signed consent